RECORD AND BRIEFS

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In the

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF KANELAND, ILLINOIS, UNIFIED SCHOOL DISTRICT # 302 ADMINISTRATIVE SUPPORT STAFF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are employed as administrative support staff in the District Office of Kaneland School District #302, in Maple Park, Illinois. Through no choice of their own and against their will, they are in the process of being forced either to join the union or to pay so-called "agency" fees to the Illinois Education Association as a condition of their continued employment. The IEA is an affiliate of the National Education Association, the mission statement of which is explicitly in part "to be THE advocacy organization for all public education employees." http://www.ieanea.org/about/history/.

Stacy Krisch is a Special Service Secretary employed by the District since July 1, 2013. Christine M. Crome is an Accounts Payable Assistant who has been employed by the District since 2006. Virginia Thomas is Administrative Assistant to the Director of Special Services and has been employed by the District from 1991 to 2006 and again since 2009. Barbara Bradford is a Payroll

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* or their counsel have made such a monetary contribution. Pursuant to Supreme Court Rule 37.2, counsel of record received timely notice of the intent to file this brief under the Rule and consent was granted.

Administrator who has been employed by the District since 1998. Linda Ross is an Assistant to Educational Services and has been employed by the District since 2000. Susan Austin has been an Accounts Payable Administrator with the District since 1991. Beth Sterkel is an Administrative Assistant to the Superintendent employed by the District since August 1991. Pamela G. Long is an Administrative Assistant to Associate Superintendent also with the District since 1991. Eileen Brettman is Benefits Administrator for Kaneland C.U.S.D. #302 and has been employed with the District since approximately 2005. Ms. Sterkel, Ms. Long, and Ms. Brettman have been classified as "exempt" by the IEA but oppose the imposition of mandatory union dues or agency fees on their office mates because it interferes with office morale and the ability of the group to work as a team.

Because this case implicates the decision that permits such "agency shop" arrangements, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), amici have a pronounced interest in the outcome of this case.

SUMMARY OF ARGUMENT

Public employee unions in the United States are peculiar creatures. Unlike private sector unions, which pit labor against management, they permit labor and management to sit on the same side of the table. Both labor and management are ultimately employees of the people of the governing jurisdiction, who may speak only through their elected representatives. Franklin D. Roosevelt, Letter on the Resolution of Federation of Federal Employees

Against Strikes in Federal Service, August 16, 1937, http://www.presidency.ucsb.edu/ws/?pid=15445, last visited February 23, 2015 ("[At the federal level], the employer is the whole people, who speak by means of laws enacted by their representatives in Congress."). As such, "decisionmaking by a public employer is above all a political process" undertaken by people "ultimately responsible to the electorate." *Abood* at 228; see *Harris v. Quinn*, 573 U.S. ___ , 134 S.Ct. 2618, 2631-32 (2014).

In the words of President Roosevelt, therefore, "[a]ll Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service" because of its "distinct and insurmountable limitations when applied to public personnel management." *Id.* "The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations," President Roosevelt continued. "... Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters." *Id.*

Among the laws that properly restrict the activities of public sector unions is the First Amendment of the United States Constitution. This Court has long held that government employers "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

Under federal law, even in agencies in which unionization is permitted, no employee is required to join the union or to pay any union fee. To the contrary, each employee has the right to "form, join, or assist any labor organization, or to refrain from any such activity, ... and each employee shall be protected in the exercise of that right." 5 U.S.C. § 7102. The choice lies entirely with an employee

The cost to the employer – President Roosevelt's "whole people" who form the basis of our nation's Constitutional republic and are the bedrock of our democracy – has been both direct and indirect. The federal debt, which represents the accumulated deficits of all federal spending, includes obligations for wages and benefits that exceed market levels due to government employee unionization. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 228, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (A public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases."); *Harris v. Quinn*, 573 U.S. ___ , 134 S. Ct. 2618, 2631 (2014).

At the state and local levels, the people suffer from the same above-market costs of public sector unions. At the same time, public employees who do not wish to join unions or to pay associated "agency fees" find their First Amendment rights muzzled. Under Illinois state law, as in California, certain employees must sacrifice their First Amendment rights to independent political speech as a condition of employment. That is the case of *amici* here, all of whom work for Kaneland District #302 in Illinois. Although *amici* voted unanimously not to join the IEA, their vote was overwhelmed by teachers'

assistants in the District and all but three of them will now be compelled to pay union dues or "agency fees" against their will. Even the three *amici* who have been told that they will be "exempt" oppose the forced unionization of their team.

This Court has in the past upheld agency fees for private union workers on the ground that private sector political activity on the one hand can be relatively easily separated from labor organizing and administration activities on the other. *Machinists v. Street*, 367 U. S. 740 (1961); *Railway Employees v. Hanson*, 351 U. S. 225 (1956). As this Court finally recognized in *Quinn*, however, that distinction is artificial and unworkable in the public sector, is based on no reliance interest of any party, and is anomalous in the face of changing circumstances.

Abood's contrived distinction is particularly unworkable in Illinois, where *amici* work and reside. There the conflation of public sector union organizing and partisan political activity is nearly complete, with so-called "fair share" contributions for non-union members approaching 100% of union dues. This has played a key role in causing the State's current abysmal fiscal condition and threatens vital public services while violating fundamental First Amendment freedoms. Highlighting *Abood*'s unworkable line between the political and bargaining activities of public sector unions, Illinois's newly-elected Governor has recently invalidated the so-called "fair share" arrangements for employees within the Governor's jurisdiction, which does not include *amici*.

These conditions described above more than satisfy the Court's criteria for overturning precedent set forth in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). *Amici* therefore applaud the Governor's action and urge this Court to grant the writ of certiorari and put an end to *Abood* so that all workers in Illinois and the nation may enjoy the full extent of their constitutionally-guaranteed freedoms.

ARGUMENT

I. Recent Developments in Illinois Cry Out for Certiorari Review.

The Illinois Public Labor Relations Act, 5 ILCS 315/6, governs collective bargaining relationships with public unions in Illinois. Section 6 permits a collective bargaining agreement to require covered employees "who are not members of the organization" to pay "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment," a so-called "fair share." *Id.* 315/6(e).

Under the Act, the Illinois Department of Central Management Services ("CMS"), an agency within the direction and control of the Governor, has entered into collective bargaining agreements with multiple unions. *See, e.g.*, *AFSCME Master Contract 2012-2015*, *available at* http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf (last visited Feb. 27, 2015). These agreements contain provisions requiring nonmembers to pay "fair share" fees to the unions. *See id.* Art. IV Sec. 3. The resulting numbers undermine *Abood*'s every assumption.

By statute, nonmembers' "fair share" fees may not exceed the amount of dues uniformly required by members. *See* 5 ILCS 315/6(e). Yet unions do not account to non-members for how they calculate "fair share" contributions. *See* Complaint, *Bruce Rauner, Governor of the State of Illinois, v. American Federation of State, County, and Municipal Employees Council 31, AFL-CIO, et al.*, Case: 1:15-cv-01235, U.S.D.C., N.D.IL, Document #: 1 Filed: 02/09/15, ¶ 55. In practice, therefore, Illinois public sector unions collect "fair share" fees ranging from 79% to 100% of members' dues. *Id.* ¶¶ 57-61. There is, in other words, no meaningful financial distinction between joining and not joining a public sector union in Illinois — the employee pays the same amount to the union.

The imposition on non-member employees' fundamental freedoms is far from trivial. According to recent data, over 6,500 out of 46,000-odd Illinois State employees covered by collective bargaining agreements have chosen not to join a union, and yet are forced to fund the unions' activities through "fair share" contributions. *Id.* ¶¶ 53, 62. As argued in Section II, each of these 6,500-plus employees finds his or her First Amendment rights violated in at least three ways.

Enriched by contributions from members and nonmembers alike, public sector unions in Illinois, whose labor and management sit on the same side of the table, have negotiated wages and benefits that have unrealistically kept going up while the state economy has kept going down. Since 2004, public union employee wages have increased approximately 80%, compared to same-time inflation of 26% and private sector salary

increases of 31%. *Id.* ¶ 63. And a unionized Illinois government employee earning an average $38,979 annual salary over a 26-year career contributes approximately $40,539 to the State's pension system, yet is entitled to receive $821,588 in pensions over a twenty-year retirement, plus retiree health care. *Id.* ¶ 66.

These union benefits have contributed to a remarkable structural budget deficit and to repeated credit rating downgrades in Illinois. *Id.* ¶ 67. In fiscal year 2015, pension costs attributable to the general fund exceeded $7.5 billion, or about 24% of state-source general fund revenue. *Id.* The overall unfunded liability of the State's pension systems now exceeds $111 billion. *Id.* The State must implement emergency fiscal measures just to be able to pay its bills for fiscal year 2015. *Id.* ¶ 68. As a consequence, critical state services may have to be reduced or eliminated.

That the unions' collective bargaining process has such a drastic impact on the State's fiscal stability highlights the degree to which collective bargaining in the public sector is inherently political activity. When unions expend dollars collected from nonmembers through forced "fair share" contributions either to lobby or to bargain for increases in (or against reductions of) their benefits, they necessarily compete against other special interests for the same limited pool of financial resources. Thus, *contra Abood*, there is no principled distinction on the one hand between unions' collective bargaining and, on the other, lobbying (by unions or any other special interest) to protect favored programs or services.

And that is just the financial nature of union's collective bargaining. Equally if not more important are the topics on which unions force the State to bargain. Unions have successfully bargained, for example, for "bumping" rights, which mean that, during layoffs inherent in facility closures, a more senior union employee can force a more junior colleague to "bump down" in rank or out of a job altogether. *See, e.g.*, *AFSCME Master Contract*, Art. XX Sec. 3. Because bumping and similar union-negotiated restrictions considerably slow down facility closures, they frequently also impede policy decisions that arise after extensive public debate. In other words, any line between collective bargaining for bumping rights and public policy debate on matters that end up implicating the same bumping rights is purely imaginary. Once again, collective bargaining is lobbying.

Against that backdrop, on February 9, 2015, the Illinois Governor issued Executive Order 15-13 directing CMS and other state agencies to cease enforcing fair share provisions in public sector unions' collective bargaining agreements. The Governor has concluded that, in light of *Harris v. Quinn*, he can no longer condone the practice of forced fair share contributions, because it infringes on nonmembers' First Amendment rights to refrain from supporting public sector unions in their organization and collective bargaining activities. *Rauner* Complaint, ¶¶ 81-83.

But the Executive Order is properly limited by the Governor's authority, which extends only to employees of the Executive Branch under the jurisdiction of the Governor. To make sure that his constitutional determination applies broadly to

all public sector employees in Illinois, the Governor has filed a federal court suit seeking a declaratory judgment that Illinois's statutory "fair share" provisions are unconstitutional under the First Amendment. *Id.* at 21.

By granting this petition for certiorari and overturning *Abood*, this Court will expedite the process of ensuring that no public sector employees in Illinois or throughout the nation are forced to fund political activities with which they disagree. *Amici*, who fall outside the scope of the Governor's Executive Order 15-13 and otherwise lack protection, therefore urge the Court to grant the petition and to overturn *Abood*.

II. *Abood* on Its Face Conflicts with Core First Amendment Principles.

Just as the First Amendment prohibits the government from restricting expenditures of money to engage in speech, so too it prohibits coercing citizens to fund speech they oppose. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

Because public sector collective bargaining by its nature influences governmental policy, such bargaining necessarily involves political speech in a way that private sector collective bargaining does not. *Quinn* at 2631-32; *Abood*, 431 U.S. at 231; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968). As a result, public employment cannot and

should not be conditioned on subsidizing political speech any more than public employment can be conditioned on paying for lobbying for or against any particular legislation.

The artificial distinction that *Abood* attempts to impose between collective bargaining, contract administration, and grievance-adjustment purposes on the one hand, 431 U.S. at 232, 97 S.Ct. 1782, and expenditures for political or ideological purposes on the other, 431 U.S. at 236, 97 S.Ct. 1782, is not only unworkable in practice but also imposes unconstitutional conditions on employees' speech, compels subsidization of unintended speech, and imposes viewpoint discrimination. This triple threat to the First Amendment compels overturning *Abood* under the factors set forth in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

A. *Abood* Imposes Unconstitutional Conditions on Political Speech.

A long line of this Court's cases rejects "the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996); *see also, Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 673-75 (1996) (collecting cases). So, for example, public employers can neither require membership in any particular political party, *Elrod v. Burns*, 427 U.S. 347 (1976), nor bar members of even the Communist Party from public employment. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967).

Yet by allowing the government to condition employment on support for a union's "political" activities, *Abood* conflicts irreconcilably with both *Elrod* and *Keyishian*. *See Abood*, 431 U.S. at 243-44 (Rehnquist, J., concurring) ("[I am] unable to see a constitutional distinction between a government-imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."); *id.* at 260 n. 14 (Powell, J., concurring in judgment, joined by Burger and Blackmun, JJ.) ("I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of public patronage.").

As this Court has also long recognized, the First Amendment's "freedom of speech" necessarily comprises the decision of "both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487, U.S. 781, 796-97 (1988); *see also, Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). In *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968), the Court found that the First and Fourteenth Amendments prohibit firing a public school teacher for criticizing a school district's efforts to raise revenues. The Court in *Abood* therefore could not correctly permit compelling teachers to speak on those same topics. Yet that is exactly what the currently-permitted public employer "agency shop" does.

B. *Abood* Unconstitutionally Compels Unintended Speech.

Drawing on *United Foods*, 533 U.S. 405 (2001), this Court recently made clear in *Knox v. Serv. Emps. Int'l Union*, 567 US __ , 132 S.Ct. 2277, 2289 (2012), that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny. First, there must be "a comprehensive regulatory scheme involving a 'mandated association' among those ... required to pay the subsidy." *Id.* (quoting *United Foods*, 533 U.S. at 414). Second, compulsory fees may be levied "only insofar as they are a 'necessary incident' of the larger regulatory purpose which justified the required association.'" *Id.* (quoting *United Foods*, 533 U.S. at 414).

In *United Foods*, this Court had invalidated mandatory assessments imposed by a Department of Agriculture "Mushroom Council" established under Congressional authority to promote the mushroom industry. The Council funded its programs by imposing on handlers of fresh mushrooms mandatory assessments, almost all of which were used for generic advertising to promote mushroom sales. 533 U.S. at 412. Respondent objected to the mandatory fee because it wished to promote its brand of mushrooms as superior to those of other producers. *Id.* at 411. This Court found that the two conditions above could not be met.

Abood, however, stands *United Foods* on its head. First, compelling payments to public-employee unions is not incidental to a mandated association for non-speech reasons. Instead, those payments are compelled for the express purpose of supporting

union speech in collective bargaining. *Abood* therefore conflicts with the Court's refusal to uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods,* 533 U.S. at 415.

Second, *Abood* inverts the level of constitutional protections otherwise provided for commercial and purely political speech. *United Foods* obviously involved purely "commercial speech" – the promotion of mushroom sales – which this Court has consistently held is entitled to less protection than the core political speech at issue here. *E.g., R.A.V. v. City of St Paul,* 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) ("Core political speech occupies the highest, most protected position" in First Amendment hierarchy.) *United Foods* correctly invalidated mandatory commercial speech requirements, yet *Abood* continues to sanction mandated political speech. Its holding is both anomalous and contrary to *Knox.*

Third, unlike unwilling public employee union members, dissenting mushroom producers in *United Foods* were not silenced by the mandatory assessments for generic mushroom promotion; they remained free to run competing ads touting their own brands of mushrooms. Here, in contrast, consistent with the IEA's mission statement "to be THE advocacy organization for all public education employees," see http://www.ieanea.org/about/history/, state law provides an exclusive bargaining unit. *Amici* therefore cannot meaningfully engage in speech that counters the union message in dealing with their employer, the people. The combination of forced silence and forced subsidization of unwanted

speech is ample reason to find *Abood* both unsound policy and unconstitutional.

C. *Abood* Unconstitutionally Imposes Viewpoint Discrimination.

Finally, *Abood* on its face imposes the most "egregious" form of First Amendment regulation – clear-cut viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Public employees "may very well have ideological objections to a wide variety of activities undertaken by the union," *Abood* recognized, and may "believe[] that a union representing [them] is urging a course that is unwise as a matter of public policy." 431 U.S. at 222, 230. Yet *Abood*, as it stands, nevertheless permits states like Illinois to promote unions' messages by compelling employees to support them.

Under this Court's own precedent, such state-mandated support for union speech is indisputably viewpoint discrimination. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976). Yet that is exactly what agency-shop laws permit unions to do.

III. This Court Should Overturn *Abood*.

Apart from the Constitutional infirmities identified above, *Abood* more than adequately satisfies this Court's enunciated requirements for overturning a precedent: (1) whether the rule has proved to be unworkable, *Swift & Co. v. Wickham*, 382 U. S. 111, 116 (1965); (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e. g., *United States v. Title Ins. & Trust Co.*, 265 U. S. 472, 486 (1924); (3) whether related principles of law have left the old rule no more than a remnant of abandoned doctrine, *see Patterson v. McLean Credit Union*, 491 U. S. 164, 173-174 (1989); or (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

A. Abood's Distinction Between Administrative Aims And Political/Ideological Purposes Is Unworkable.

The core of *Abood*'s "split the baby" approach was to attempt to draw a line between union expenditures for collective bargaining, contract administration, and grievance-adjustment purposes, on the one hand, 431 U.S. at 232, 97 S.Ct. 1782, and expenditures for political or ideological purposes on the other. *Id.* at 236, 97 S.Ct. 1782. But even *Abood* presciently noted that "[t]here will, of course, be difficult problems in drawing lines between collective bargaining ... and ideological activities." 431 U.S. at

236, 97 S.Ct. 1782. The reason, as President Roosevelt recognized and this Court concluded in *Quinn*, is that in the public sector both collective bargaining and political advocacy are directed at the government, because the government is the employer. *Quinn* at 2633-34. In contrast, private sector collective bargaining deals with a private employer while private sector union political advocacy is directed at the government.

This Court's inability to make *Abood*'s artificial distinction workable is amply reflected in its cumbersome efforts over the past quarter century. *See, e.g., Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) (two-pronged test for railway workers); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) (focus on procedural safeguards such as audits and escrow accounts); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (discerning a three-pronged test from *Railway Employees v. Hanson*, 351 U. S. 225 (1956) and *Machinists v. Street*, 367 U. S. 740 (1961)); *Locke v. Karass*, 555 U.S. 207, 129 S.Ct. 798, 172 L.Ed.2d 552 (2009). As Justice Scalia observed in *Lehnert*, the three-pronged test the Court distilled from *Hanson* and *Street* in particular would require three separate and independent judgment calls in the absence of any objective standards: "What is `germane'? What is `justified'? What is a `significant' additional burden)." 500 U.S. at 551, 111 S.Ct. 1950 (Scalia, J.., concurring in judgment in part and dissenting in part).) Or as *Quinn* puts it more dryly, "[b]ecause of the open-ended nature of the *Lehnert* test, classifying particular categories of expenses

may not be straightforward." 134 S.Ct. at 2633 (multiple citations omitted).

As *Quinn* and *Knox* both recognize, *Abood* also untenably puts "the onus ... on the employees to come up with the resources to mount the legal challenge" to an improper allocation of expenses by the union, *Knox*, 567 U.S. at ___, 132 S.Ct. at 2294, and litigating such cases is expensive. *Quinn* at 2633. Thus besides imposing an undefinable standard, *Abood* proposes an untenable enforcement mechanism, because employees who have already had wages forcibly withheld from them are ill-equipped to bear them. *See id.*

B. Abood Has Created No Valid Reliance Interests.

The *Quinn* dissent to the contrary notwithstanding, *Abood* has created no valid reliance interests within the meaning of *Casey*. The proper reliance inquiry, *Casey* teaches, "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." 505 U.S. at 855-56, citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Thus "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context." *Id.; see Quinn*, 134 S.Ct. at 2652 (Kagan, J., dissenting).

Yet a public sector union activity arises not in the commercial context, but in the political/governmental sphere, and involuntarily coerced "agency fees" are by definition not the product of a freely-bargained-for commercial transaction. Because "the union has no

constitutional right to receive any payment" from non-members, *Knox*, 132 S.Ct. at 2295, no reliance interest can possibly be at stake here. The unions' only interest is in maintaining a status quo in which it receives a maximum portion of employees' paychecks at the expense of non-union members' First Amendment rights. Under *Casey*, unions have no reliance interest that justifies continuing to uphold *Abood*.

The *Quinn* dissent argues that *Abood* has created a strong reliance interest because more than twenty states, the dissent insists, have enacted "fair share" laws that have led "public entities of all stripes" to enter multi-year union contracts with such provisions. 134 S.Ct. at 2652 (Kagan, J., dissenting). Yet the same could equally be said for upholding as precedent *Plessy v. Ferguson*, which until overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954), had encouraged states to establish racially segregated "separate but equal" schools and to contract with and assign teachers and staff on that inherently suspect basis. Hard cases may make bad law, but the Court should not be in the business of perpetuating bad law.

The Quinn dissent's characterization, moreover, obliterates the distinction between the political and the commercial that it cites as critical to its reliance analysis, 134 S.Ct. at 2652, citing *Payne*, 501 U.S. at 828, 111 S.Ct. 2597, in the same way that has always made *Abood* an anomalous outgrowth of the distinguishable *Hanson* and *Street*. See *Quinn* at 2632.

C. *Abood* Is Anomalous.

Unions are fundamentally about bargaining and bargaining is fundamentally about advocacy; indeed, bargaining requires advocacy through speech and sometimes action, such as strikes or slowdowns. Thus this Court recognized in *Davenport v. Washington Education Association,* 551 U.S. 177, 181 (2007), that "[t]he primary purpose of [agency-shop] arrangements is to prevent non-members from free-riding on the union's efforts ... without sharing the costs incurred." Yet when dealing with *Abood* in the compelled-speech context, the Court typically suggests, anomalously, that unions are not fundamentally about advocacy.

In *Keller v. State Bar of Cal.,* 496 U.S. 1 (1990), for example, the Court analogized the relationship of a union and its members to the relationship between a state bar and its members, 496 U. S. at 12, even though the primary purpose of bar associations is to regulate the legal profession through ethical codes and disciplinary rules, not to further speech. See *Quinn* at 2643.

In *United Foods*, the Court posited that government can compel speech only in the presence of an "overriding associational purpose" independent of the compelled speech. 533 U.S. at 413. It therefore attempted to explain *Abood* by noting that in order "[t]o attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another" to further the "legitimate purposes" of the group. *Id.* at 414. Yet mandatory association with unions can have no

practical purpose "independent from the speech itself." *United Foods,* 533 U.S. at 415.

The inability of the Court to reconcile its characterization of unions as solely about advocacy when *Abood* is not concerned but as dealing with matters other than advocacy when *Abood* is at issue makes it difficult to see *Abood* as anything other than an anomaly, "a mere survivor of obsolete constitutional thinking." *Casey,* 505 U.S. at 857. The Court should overturn it.

D. Post-Abood Factual Developments Confirm *Abood*'s Lack of Justification.

Whatever role labor unions once played in America, salutary or otherwise, contemporary public-sector unions have become primarily public players on a partisan political stage. They raise money, they advocate public policy positions, and they support candidates for political office. As such, public sector unions are virtually indistinguishable from political parties, as recent Illinois municipal election results from the City of Chicago amply attest.

As the candidate backed by the Chicago Teachers Union, for example, underdog Jesus "Chuy" Garcia took 35% of the vote in Chicago's February 25, 2015, mayoral election, forcing a runoff with former White House Chief of Staff and incumbent Democrat Mayor Rahm Emanuel. (No Republican was even in the race.)

Under *Abood*, compelling "fair share" payments to the Chicago Teachers Union in advance of the mayoral election would have been constitutional, even for employees who oppose the practices of the

union or the policies of Garcia. At the same time, compelling payments to the Chicago Democratic Party or to Emanuel would be obviously unconstitutional, even if the party or the mayor lobbied the legislature on behalf of petitioners and limited petitioners' "fair share" charges to compensating the party or the mayor's campaign fund for their efforts. The distinction is entirely artificial. And whether the public sector union is the CTU or the IEA makes no difference; their mission is the same. So long as *Abood* remains in force, *amici* will be compelled to pay "agency fees" in lieu of union dues to support political views with which they disagree.

CONCLUSION

The time has come for this Court to recognize that *Abood* is both outmoded and unworkable. The Court should take the step left open in *Quinn* and overturn it entirely.

Respectfully submitted,

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